No. 20-1532

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In The
# Supreme Court of the United States

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DIANA GARVEY,

*Petitioner,*

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

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**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

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## REPLY BRIEF FOR PETITIONER

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ROBERT C. BROWN, JR.
TOMMY KLEPPER
& ASSOCIATES
702 Wall Street, Suite 100
P.O. Box 721980
Norman, OK 73070

KENNETH M. CARPENTER
*Counsel of Record*
KENNETH H. DOJAQUEZ
CARPENTER, CHARTERED
1525 SW Topeka Blvd.,
Suite D
Topeka, KS 66601
(785) 357-5251
kmcarpenter@
mindspring.com

*Counsel for Petitioner*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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## INTRODUCTION

The Secretary's regulation at 38 C.F.R. § 3.12(d)(4) is not consistent with the unambiguous definition of a "veteran" provided by Congress in 38 U.S.C. § 101(2). Congress's definition is in two parts. First, in order to be a "veteran" that person must have served in the active military, naval, air, or space service. Such a person must have been "discharged or released" from such service "under conditions other than dishonorable."

The only purpose of § 101(2) is to determine who is or is not a veteran. Then, the only qualification for DIC is that the claimant be the surviving spouse of a veteran. 38 U.S.C. § 1310(a). Section 1310 further mandates "D[IC] shall not be paid to the surviving spouse . . . of any veteran . . . unless such veteran was discharge or released under conditions other than dishonorable. . . ." *See* § 1310(b).

Here we see Congress incorporating the same terms from § 101(2) so we may presume it carries the same meaning. Thus, this action turns on what Congress meant when it defined a veteran as one who was "discharged or released under conditions other than dishonorable."

Section 3.12(d) expands upon the definition of veteran found in § 101(2) by equating "dishonorable conditions" with the listed offenses. But Congress did not give the Secretary unlimited rule making authority under the provisions of 38 U.S.C. § 501(a). Instead, Congress conditioned the Secretary's authority by

requiring that his regulations be both necessary and appropriate in order to carry out the laws he administers and must be consistent with those laws. Section 3.12(d)(4) is neither.

## REASONS FOR GRANTING THE PETITION

### I. Congress's Definition Of Veteran Does Not Support The Validity Of 38 C.F.R. § 3.12(d).

#### A. Congress's Definition Is Clear On Face.

The term "veteran" is defined as "a person who served in the active military, naval, air service, or space service and who was discharged or released therefrom *under conditions other than dishonorable*." 38 U.S.C. § 101(2) (emphasis added). The Government asserts in its response in opposition that: "The disputed issue in this case concerns the proper understanding of the italicized language." Resp., pg. 3. The disputed issue in this case concerns more than the proper understanding of just the italicized language. The definition used by Congress must be understood in context. This is so because whether a person is a veteran under § 101(2), determines not only that person's entitlement to benefits, but also his widow.

The issue in this case concerns what Congress meant when it referenced a discharge *under conditions other than dishonorable*. Congress's meaning is clear, to be considered a veteran, a person must have served in an active service and must have been discharged ***or*** released from such service under conditions as set by

the service department as having been other than dishonorable. (Emphasis added). Thus, when read in context, the definition of a veteran is based on having served and on the condition proscribed by the branch of service in which the person served. The service departments, and not VA, determine the conditions upon which the person was discharged or release from active service.

### B. The Meaning Of The Phrase "Under Conditions Other Than Dishonorable" In 38 U.S.C. § 101(2) Does Not Create An Interpretative Gap.

The Government argues as the Federal Circuit held that because Congress defined the term "veteran" to mean a former service member who was discharged "under conditions other than dishonorable" § 3.12(d)(4) was consistent with that definition. They both misread the meaning the phrase "under conditions other than dishonorable" to relate to the "conditions" of discharge. To the contrary, all that the plain language of 38 U.S.C. § 101(2) mandates is that a veteran's discharge from service only be a discharge which was "under conditions other than dishonorable."

A discharge or release from active service is a process undertaken by each service department, VA has no role in the discharging or releasing of service members. Nor does VA have a role in setting or determining the conditions of discharges or releases. Nothing in language used by Congress in § 101(2)

suggests anything other than that VA will accept and process applications for VA benefits from a person discharged or released from service as a veteran so long as the discharge or release was "under conditions other than dishonorable." Contrary to the assertion of the Government there is no interpretive gap in § 101(2) empowering VA to fill. *See Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

### C. The Phrase "Under Conditions Other Than Dishonorable" Is Not Ambiguous.

The phrase "under conditions other than dishonorable" can have only one meaning. The meaning is simply that all discharges or releases from active service which were issued by a service department "under conditions other than dishonorable" were issued to persons entitled to receive VA benefits. Conversely, any person who has been veteran discharged or released from active service by a service department under "dishonorable" conditions does not meet the statutory definition of the term "veteran" under § 101(2).

Congress in § 101(2) has directly spoken to the precise question at issue in this appeal and told us who or who is not a veteran. Because the intent of Congress is clear, that is the end of the matter as this Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.*, 467 U.S. 842-843.

### D. Congress Said What It Meant And Meant What It Said.

Congress said in § 101(2) that a veteran means a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable. Mr. Garvey served in the active military and was discharged with an "Undesirable Discharge." An "Undesirable Discharge" is a discharge "under conditions other than dishonorable." It was not a discharge under dishonorable conditions. The goal of an interpretive endeavor is to identify and implement Congress's purpose in enacting a given statute. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962))).

Section 101(2) clearly expressed the legislative purpose in defining the term "veteran" by using the ordinary meaning of the words "under conditions other than dishonorable" to describe a veteran's discharge or release from service. The ordinary meaning of a discharge or a release "under conditions other than dishonorable" is that such a discharge includes any other type of discharge which is not based on a dishonorable discharge.

Dishonorable discharges are handed down for what the military considers the most reprehensible conduct. This type of discharge may be rendered only by conviction at a general court-martial for serious

offenses (e.g., desertion, sexual assault, murder, etc.) that call for dishonorable discharge as part of the sentence.

According to data from the Office of the Secretary of Defense, the discharges from the 2014-2015 fiscal year break down as:

Honorable: 78.29 percent

General – Under Honorable Conditions: 6.36 percent

Under Other Than Honorable Conditions: 2.09 percent

Bad Conduct: 0.49 percent

***Dishonorable: 0.07 percent***

The remaining 13.7 percent were either "uncharacterized" or unknown due to data entry error. https://www.veteransaidbenefit.org/correcting_military_discharge.htm (last visited September 14, 2021). Less than 1 percent of service members receive dishonorable discharges. All other discharges are "under conditions other than dishonorable."

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

## II. Section 101(2) Does Not Need Further Clarification.

### A. Congress Identified Specific Acts By Service Members Which Constitute A Bar To Receipt Of VA Benefits.

Further undermining the validity of § 3.12(d)(4) is Congress's identification of certain specific acts by former service members – who meet the definition of veteran under § 101(2) – which Congress mandated would be a bar to such veterans' receipt of VA benefits. In § 5303(a) Congress was unambiguous that a discharge for certain acts would be a bar to the receipt of VA benefits. In so doing, Congress did not speak in terms of these acts needing to be considered to have been dishonorable. Instead, Congress stated only that if there was a discharge or dismissal by reason of these acts such discharge or dismissal, alone, shall bar all rights of such person under laws administered by the Secretary.

In doing so, Congress only concerned itself with whether these explicitly identified acts were the reason for the discharge or dismissal. Congress did not identify any other acts. Nor did Congress direct the Secretary to promulgate a regulation which would identify other acts that the Secretary might, upon his review, consider to have been issued under dishonorable conditions.

### B. The Evident Incongruity Of The Secretary's Regulation And The Plain Language Of § 5303(a).

The Federal Circuit in its decision and the Government in its response in opposition to Mrs. Garvey's petition overlooked the evident incongruity of the Secretary's regulation and the plain language of § 5303(a). The Secretary in § 3.12 merely "parrots" statutory language of Congress as set out in § 5303(a). *See Gonzales v. Oregon*, 546 U.S. 243, 257, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006); *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (an agency cannot "under the guise of interpreting a regulation . . . create *de facto* a new regulation"). The Supreme Court in *Gonzales v. Oregon* characterized the regulation in that case as a parroting regulation because it "just repeats two statutory phrases and attempts to summarize the others." 546 U.S. at 257, 126 S.Ct. 904. The Court added that the regulation "gives little or no instruction on a central issue." *Id*.

Section 3.12(a) begins by restating Congress's intent – "pension, compensation, or [DIC] is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable." This is precisely what Congress said about both former service members and surviving spouses. *See* §§ 101(2) & 1310(b). But the Secretary goes a step further than Congress by using the bar to benefits under § 5303 to also bar a surviving spouse from receiving DIC.

Section 5303's bar to benefits very explicitly applies only to the person who was discharged. *See* § 5303(a) ("The discharge or dismissal by reason of [any of these listed reasons] shall bar all rights **of such person** under laws administered by the Secretary. . . ."). (Emphasis added). But in his regulation, the Secretary precludes payment of all benefits "where the former service member was discharged or released under one of the following conditions. . . ." *See* § 3.12(c). The regulation then "parrots" statutory language of Congress as set out in § 5303(a).

But these acts are only a bar to benefits for the former service member, and nothing in §§ 1310 or 5303(a) indicate Congress's intent to bar a surviving spouse from benefits for this same conduct.

In § 3.12(d), the Secretary begins as follows: "A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions." In § 5303(a), Congress does not provide that a discharge or release for one of the acts specified was to be "considered to have been issued under dishonorable conditions."

Furthermore, the Secretary on his own initiative and without basis in § 5303(a) added to the acts identified by Congress in § 3.12(d)(4) "Willful and persistent misconduct" and in § 3.12(d)(5) "Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty."

The second sentence of § 3.12(d)(4) compounds the incongruity of the Secretary's regulation with clearly

articulated acts set out by Congress in § 5303(a) provides: "This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct." Congress plainly did not include "a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct."

The inescapable intent of Congress as unambiguously expressed in the plain language of § 5303(a) was to identify particular acts which Congress considered by their specific nature that were the reason for a discharge or release from active service.

Section 3.12(d)(4) represents a usurpation of rulemaking authority delegated to the Secretary under § 501(a). Nothing about § 3.12(d) in its totality is consistent with the laws administered by the Secretary. Section 3.12(d)(4) cannot be justified on the basis that the VA Secretary had statutory authority to promulgate 38 C.F.R. 3.12(d), and that § 3.12(d)(4) in particular reflects a permissible construction of § 131(b) or of § 101(2).

### C. The Government Does Not Identify The Statutory Basis For The Secretary's Authority To Recharacterize The Discharged Or Released From *Under Conditions Other Than Dishonorable* To Be Considered To Be Dishonorable.

The Government's defense of the Secretary's rulemaking is based upon a flawed premise that some combination of the definition of veteran in § 101(2) and the limited scope of § 5303(a) creates a basis for the provisions of § 3.12(d)(4). However, once the actual language used by Congress in § 101(2) and § 5303(a) are examined neither statute supports the validity of § 3.12(d)(4).

This Court has held "[t]he only authority conferred, or which could be conferred, by [a] statute is to make regulations to carry out the purposes of the act – not to amend it." *Miller v. U.S.*, 294 U.S. 435, 440 (1935). This is exactly what the Secretary has done – amend § 101(2) to contract the definition of "veteran" to exclude more than what Congress intended. Section 3.12(d)(4) allows the Secretary to change a decision of a service department from a discharge "under conditions other than dishonorable," to "have been issued under dishonorable conditions." There is no authority from Congress for such an action to be taken by the Secretary. Rather, the VA has authority only to issue a regulation that aids it to carry out the directive of Congress to pay benefits to all veterans as defined in § 101(2).

The statutes relied upon by the Government are narrow and specific; and neither provides a basis for the Secretary to act in the manner provided for in § 3.12(d)(4). Section 101(2) is a definitional statute and does not justify as argued by the Government a basis for a permissible construction to allow the Secretary to not only second guess the decision of a service department regarding the discharge issued as under conditions other than dishonorable to be recharacterized by the Secretary as "considered" to be under dishonorable conditions. The contention of the Government that because § 101(2) does not define what "conditions" of discharge should be considered "dishonorable" is without merit. There is no basis in the language of § 101(2) to allow the Secretary to determine what conduct occurring while on active duty should be "considered" by the Secretary to have been dishonorable. That is solely within the province of the service department to determine and nothing in Congress's definition of a "veteran" warrants the Secretary making such judgments.

Likewise, § 5303(a) affords no support for the validity of § 3.12(d)(4). Section 5303(a) is a clear but limited expression of the intent of Congress concerning six specified acts which if those acts and those acts, alone, were the reason a person serving on active duty was discharged from service all rights to VA benefits are forfeited by the service member. The Secretary cannot lawfully add acts which were not the stated reason by the service department for the discharge or release from service.

Because, there is no statute upon which § 3.12(d)(4) can be supported, this regulation is invalid as a matter of law and must invalidated by this Court.

## III. The Circuit Court Found Ambiguity In 38 U.S.C. § 101(2) In Contravention Of Established Law.

The Federal Circuit determined that § 101(2) is ambiguous. Pet. App. 10. However, it did so under an incorrect application of the law. Mrs. Garvey pointed out in her petition that this Court held when interpreting a regulation, there is a very specific framework that courts must use to determine the full "zone of ambiguity." Petition for Writ of Certiorari, at 19. She also asked this Court to "clarify the standard employed by the courts when interpreting a statute" specifically asking what role the ruling in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) plays. Petition for Writ of Certiorari, at 20.

In response, the Government responds that this is not a case about the interpretation of a regulation, nor is it one of deference to the Secretary's interpretation. Brief for the Respondent in Opposition, at 20. However, this misses the point. The Federal Circuit did not employ any framework, much less the correct one, when it determined that the statute is ambiguous. Furthermore, even if the statute is ambiguous, *Kisor* directs the next step is to determine the "zone of ambiguity" to ensure that the Secretary's interpretation is reasonable. *See Kisor*, at 2416. For it is only a

reasonable interpretation that has any force of law. *Id.*, at 2415-2416.

What is unknown at this point is how Courts are to determine whether a statute is ambiguous. We know from *Kisor* how Courts are to determine whether a regulation is "genuinely ambiguous," but no such rule exists for statutes.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

KENNETH M. CARPENTER
*Counsel of Record*
KENNETH H. DOJAQUEZ
CARPENTER, CHARTERED
1525 SW Topeka Blvd.,
Suite D
Topeka, KS 66601
(785) 357-5251
kmcarpenter@mindspring.com

ROBERT C. BROWN, JR.
TOMMY KLEPPER & ASSOCIATES
702 Wall Street, Suite 100
P.O. Box 721980
Norman, OK 73070

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